IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IOMEDIA PARTNERS, INC., et al., Appellants, v. UNITED STATES COPYRIGHT OFFICE, LIBRARY OF CONGRESS, Appellee.	No. 02-1244 (Consolidated with Nos. 02-1245, 02-1246, 02-1247, 02-1248, and 02-1249)

IOMEDIA PETITIONERS' OPPOSITION TO MOTION TO DISMISS

I. INTRODUCTION

The Librarian of Congress asks the Court of Appeals to dismiss the timely petition for review of eighteen of the nineteen petitioners who are jointly seeking review of the Librarian's Final Rule setting royalties for compulsory licenses for "webcasting" of sound recordings ("the ioMedia Petitioners.") The Librarian's motion argues that these parties- aggrieved parties bound by the Librarian's determination—lack standing because they did not participate in the Copyright Arbitration Royalty Panel ("CARP") proceeding that was the basis for the Librarian's Final Rule. But Congress, in the plainest possible language, provided for a right of appeal for aggrieved parties bound by the determination. The phrase "parties to the proceeding"—which appears elsewhere in the Copyright Royalty Tribunal Reform Act—is not found in the section providing for judicial review. Additionally, because the ioMedia Petitioners merely seek to join with Live365, a company that presented a full case and arguments in the CARP, to challenge the

Librarian's determination, the Librarian can offer no justification for dismissing them as joint petitioners. The Court should deny the motion to dismiss.

II. THE IOMEDIA PETITIONERS ALL HAVE STANDING BECAUSE THEY ARE BOUND BY THE DETERMINATION OF THE LIBRARY OF CONGRESS

Section 802(g) of 17 U.S.C. provides that "any decision of the Librarian of Congress under subsection (f) with respect to a determination of an arbitration panel" "may be appealed, by any aggrieved party *who would be bound by the determination*, to the United States Court of Appeals for the District of Columbia Circuit. (emphasis supplied). Black's Law Dictionary defines "aggrieved party" as follows:

> One whose legal right is invaded by an act complained of, or whose pecuniary interest is directly affected by a decree or judgment. One whose right of property may be established or divested. The word "aggrieved" refers to a substantial grievance, a denial of some personal or property right, or the imposition of a burden or obligation.

Black's Law Dictionary 34 (5th ed. 1983). Petitioners' pecuniary interests are directly affected by the Librarian's Final Rule, and their rights as compulsory licensees are contingent on their ability to pay the royalties set by the Final Rule. The Final Rule imposes a burden and obligation on Petitioners to pay fees assessed at the rates chosen by the Librarian. Accordingly, Petitioners are aggrieved parties.

It is undisputed that all the ioMedia Petitioners, as webcasters that have made transmissions pursuant to the compulsory license granted by 17 U.S.C. § 112(e) and 17 U.S.C. § 114, are entities that are bound by the Librarian's determination. *See* 17 U.S.C. § 114(f)(2)(B). Accordingly, they have standing to appeal the determination, under Section 802(g). The Court need not go beyond the plain language of the statute and, indeed, should not. *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental

canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-242 (1989) (where statute's language is plain, the sole function of courts is to enforce it according to its terms).

The Librarian argues that "aggrieved party" in the Reform Act should be construed differently than its plain English meaning and Black's Law Dictionary's definition, to mean that a person seeking judicial review of the Librarian's decision must have participated in the CARP proceeding. Motion to Dismiss at 9-16. But the Librarian concedes that the construction of "aggrieved parties" in *Simmons v. ICC*, 716 F.2d 40 (D.C. Cir. 1983), has never been applied to Section 802(g). *See* Motion to Dismiss at 13. Thus, the Court would not be required to follow *Simmons* and its progeny, even if the judicial review provision here used the phrase "aggrieved parties" without the modifying phrase "who would be bound by the determination." The Court certainly is not required to apply the same logic here, where Congress used the phrase "aggrieved party who would be bound by the determination" to clarify which aggrieved parties have standing to seek judicial review. Additionally, *Simmons* did not concern a petition by a group that included a participant to the proceedings below.

The statute provides that parties who are bound by the determination may appeal. The construction of "aggrieved party" urged by the Librarian would render that phrase superfluous. Every entity that participated in the CARP is bound by it, because all CARP participants were either copyright owners or copyright users. "[C]ourts should disfavor interpretations of statutes that render language superfluous." *Connecticut Nat'l. Bank v. Germain*, 503 U.S. 249, 253 (1992) (appellate jurisdiction over certain district court

orders should not be limited by negative implication). Not every party aggrieved by the Librarian's Order, however, is "bound by the determination." For example, third parties, such as artists who do not own the copyrights to their recordings, but rely on Internet radio to reach an audience and promote their recordings and concerts, are "aggrieved" by the Librarian's order and its effects, even though they themselves are not bound. Petitioners are not arguing that those aggrieved parties have standing to appeal the Librarian's determination. Accordingly, the phrase "bound by the determination" modifies and narrows the term "aggrieved party" and is not superfluous.

The Librarian's Motion to dismiss fails to give any explanation for the phrase "who would be bound by the determination"- which is the only phrase in 802(g) expressly modifying the phrase "aggrieved party." But *every* phrase in a statute must be given effect. The Court should does not start, as the Librarian would have it do, with the premise that statutory language is imprecise. Instead, the Court must "assume that in drafting legislation, Congress said what it meant." *United States v. LaBonte*, 520 U.S. 751, 757 (1997) ("maximum" in sentencing guideline means maximum sentence authorized for the offense of conviction.") *See also Connecticut Nat'l. Bank v. Germain*, 503 U.S. 249, 253 (1992) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there"); *United States v. Goldenberg*, 168 U.S. 95, 102-103 (1897) (the lawmaker "is presumed to know the meaning of words and the rules of grammar").

If Congress had intended to limit the right to appeal to parties that participated in the CARP proceedings, it knew how to do so. For instance, in the provision immediately following that on judicial review, Congress provides that "In ratemaking proceedings, the

reasonable costs of the Librarian of Congress and the Copyright Office shall be borne by *the parties to the proceedings* as directed by the arbitration panels under subsection (c)." 17 U.S.C. § 802(h)(1). *See also* 17 USC §802 (c) ("...parties to the proceeding shall bear the entire cost thereof..."); 17 USC § 114(f)(1)(A) ("The parties to each negotiation proceeding shall bear their own costs"); and § 114 (f)(2)(A) (same). Congress could easily have added the same phrase "to the proceeding" to modify "aggrieved party" in Section 802(g), but it did not do so. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (*quoting United States v. Wong Kim Bo*, 472 F.2d 720 (5th Cir. 1972)); *Brown v. Gardner*, 513 U.S. 115, 120 (1994); *United States v. Goldenberg*, 168 U.S. at 103 (no necessity for applying the same limitation in one clause that is provided in the other). Instead, Congress used the modifying phrase "who would be bound by the determination"—a phrase the Librarian conveniently ignores, misleadingly describing the language of 802(g) as "substantively identical" to that in *Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983). *See* Motion to Dismiss at 13.

The Court should also note that Section 802(g) provides the right of appeal to *any* aggrieved party who would be bound by the determination. The Supreme Court has considered the term "any" in other statutes. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind." *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New Int'l. Dictionary*

97 (1976)). In the absence of any language limiting the breadth of that word," it must be read as referring to all of the subject that it is describing." *Id.*

At the time that the Reform Act was drafted, Congress realized that the webcasting field was in its infancy. Congress intended to provide a right of appellate review to parties who would be unable to participate in the expensive and time-consuming CARP proceedings but would be bound by the Librarian's determination. Congress likely predicted that companies and stations might come into existence after the CARP proceedings began but still be bound by its determination. Congress knew that the class of entities bound by the determination would be broader than the class of webcasters who could participate in the CARP process. Congress may well have intended, by using the phrase "bound by the determination" to provide an opportunity for these very parties to petition the Court for redress of their grievances. In short, there is no reason to think that Congress intended to limit the right to petition to entities that participated in the CARP proceeding.[1] The Court should deny the motion to dismiss.

III. THE IOMEDIA PETITIONERS ARE NOT "SANDBAGGING" THE PANEL AND THE LIBRARIAN BECAUSE THEIR CLAIMS ARE BASED ON THE RECORD BEFORE THE PANEL AND ON EVIDENCE PRESENTED BY LIVE365 IN THE CARP PROCEEDING.

It is undisputed that one of the named Petitioners in Appeal No. 02-1244, Live365.com, was a party to the administrative proceedings below. *See* Motion to

[1] The Librarian is simply incorrect insofar as he contends that allowing petitioners to appeal would deprive the Librarian and the Register of Copyrights of their supposed "right" under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) to construe Section 802(g). *Chevron* does not apply to statutes that confer jurisdiction on the federal courts. *See Murphy Exploration & Prod. Co. v. United States Dep't of the Interior*, 252 F.3d 473, 478-80 (D.C. Cir. 2001). In such cases, no deference should be paid to an agency's interpretation of such a statute. *Id.*

Dismiss at 1 n.1. The Librarian does not seek dismissal, at this time, of Live365's petition. *Id.* Thus, the Librarian's arguments based on the other ioMedia petitioners not having participated in the CARP ring hollow. The Librarian argues that "the risk is real that such non-participants, if allowed to challenge the Librarian's decision, could "sandbag" the agency in judicial review proceedings in this Court under Section 802(g)." Motion at 17. This argument confuses the issue of standing with the *different* issue of what arguments may properly be raised on appeal. The ioMedia petitioners recognize that under Section 802(g) they are entitled only to judicial review of the Librarian's decision on the basis of the record before the Librarian. The Librarian cannot bootstrap, from the fact that non-participants in the CARP have joined with a CARP participant to petitioned for review, that such Petitioners are seeking to withhold "legal arguments for tactical reasons until they reach the courts of appeal" and then "sandbag" the agency.[2] As noted, Petitioner Live365, as one of the Webcasters in the CARP proceeding, presented a full case to the CARP and made numerous arguments, both as part of the Webcasters group and separately after the CARP issued its report in February, 2002. *See, e.g.,* 67 Fed. Reg. at 45253. It can hardly be "sandbagging" for the ioMedia petitioners now to join with Live365 in complaining that the CARP and the Librarian improperly weighed this evidence in the record before them and arbitrarily rejected these arguments.

The Librarian also argues that allowing CARP non-participants to appeal would unfairly prejudice the CARP participants by depriving them of their right to present

[2] If, upon reading the ioMedia Petitioners' briefs on the merits of the appeal, the Librarian believes a specific argument is not properly made on appeal, not having been raised below, the Librarian may so argue in his own brief on the merits. The Court should not decide an issue of standing based on speculation about what argument might be raised on appeal.

evidence on the contentions the ioMedia Petitioner will raise in this Court. Motion to Dismiss at 17. But as noted, the record is the record, and the CARP participants, unlike the ioMedia Petitioners, had the opportunity to present evidence below. Additionally, the CARP participants bound by the determination, are, in large part, also parties to the consolidated appeals, or are at least represented in the appeals by others similarly situated. Thus the CARP participants *will* have the opportunity to present argument on the contentions these petitioners will seek to raise in this Court. The Librarian next asserts that CARP non-participants are free-riders escaping the costs imposed on parties. Motion to Dismiss at 17. But that argument is for Live365, not the Librarian, to make. Indeed, by joining with Live365, as parties to a single petition, the ioMedia petitioners who were non-participants in the CARP are sharing the burden of appeal with Live365, decreasing its burden and costs. The Librarian's argument expressly assumes that participation in the CARP was an option for the nonparticipating petitioners, while offering no evidence for that proposition. [3] It is equally likely that Congress, in creating an expensive CARP process to set the royalty rate, provided a broad right of appeal expressly to give non-participants a chance to seek review of the Librarian's decision, limited, however, to review in light of the record made by the paying participants. Thus, none of the Librarian's arguments provide a compelling reason why the ioMedia

[3] Indeed, the Register of Copyrights knows the opposite is true. Participants were required to pay the arbitrators' fees ($200-$400 /hr) out of their own pockets, and the cost of the arbitrators alone in the webcasting rate-setting proceeding exceeded the annual budget of the old Copyright Royalty Tribunal in the last year of its existence. There is no question that some interested parties could not afford the cost of participating. *See* Statement of Marybeth Peters, Register of Copyrights Before The Subcommittee on Courts, The Internet and Intellectual Property of the House Committee on the Judiciary, 107th Congress, June 13, 2002. Small webcasters had no choice but to hope that better funded entities would present the full facts and the best arguments to the CARP and that the CARP would heed them and set fair and reasonable royalty rates.

petitioners, together with an entity, Live365, which participated below, should not be allowed to challenge the royalty rates and terms set in the final rule.

IV. CONCLUSION

For the reason set forth above, the Court should deny the Librarian's Motion to Dismiss the ioMedia Group Petitioners' Appeals.

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Respectfully Submitted,

By: Barry H. Gottfried/Jna

David D. Oxenford
Barry H. Gottfried
Cynthia D. Greer
Jonathan W. Gannon
Karen-Faye Newman
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037-1128
(202) 663-8000

-and-

Elizabeth H. Rader
Stanford Law School
Center for Internet & Society
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 724-0517

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October, 2002, the foregoing ioMedia Petitioners' Opposition To Motion To Dismiss was served by U.S. mail, postage prepaid, on the following:

David O. Carson, Esq.
Office of the General Counsel
Copyright Office
James Madison Memorial Bldg.
Room LM-403
First and Independence Ave., S.E.
Washington, DC 20559-6000

William Kanter
Mark W. Pennak
Appellate Staff
Civil Division, Room 9148
Department of Justice
Washington, D.C. 20530-0001

Arthur Levine
Finnegan, Henderson, Farabow,
Garrett & Dunner
1300 I Street,. N.W.
Washington, DC 20005

Patricia Polach
Bredhoff & Kaiser, P.L.L.C.
805 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005

Peter D. Isakoff
Kenneth L. Steinthal
Adam I. Cohen
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

Robert A. Garrett
Michael J. Woods
Ronald A. Schechter
Julie L. Sigall
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004

Bruce G. Joseph
Karyn K. Ablin
Dineen Pashoukos Wasylik
Wiley Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

William Malone
James R. Hobson
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Avenue
Suite 1000
Washington, D.C. 20036-4320

Kenneth M. Kaufman
Skadden, Arps, Slate, Meager
& Flom, LLP.
1440 New York Ave., N.W.
Washington, DC 20005

Mark Jay Prak
David Kushner
Brooks, Pierce, McLendon, Humphrey &
Leonard
P.O. Box 1800
Raleigh, NC 27602

Cary Howard Sherman
Recording Industry Association
of America
1330 Connecticut Avenue
Washington, D.C. 20036

David R. Berz
Sandra M. Aistaus
Weil, Gotschal & Manges LLP
1615 L Street, N.W. Suite 700
Washington, DC 20036

Barry H. Gottfried /TNG
Barry H. Gottfried

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